

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

MALIBU MEDIA, LLC,)	
)	
Plaintiff,)	Civil Case No. <u>2:13-cv-12218-NGE-DRG</u>
)	
v.)	
)	
APRIL HOUSE,)	
)	
Defendant.)	
_____)	

MOTION FOR LEAVE TO AMEND THE AMENDED COMPLAINT

Plaintiff, Malibu Media, LLC (“Plaintiff”), by and through undersigned counsel and pursuant to Fed. R. Civ. P. 15 and L.R. 15.1 hereby moves for the entry of an order granting Plaintiff leave to amend the Amended Complaint (CM/ECF 6), and in support thereof states:

1. Fed. R. Civ. P. (15)(a) provides that “a party may amend its pleading only with . . . the court’s leave. The court should freely give leave when justice so requires.” *Id.* Absent “undue delay, prejudice to the opposing party, or repeated failure to cure deficiencies in the complaint[,]” the Court should allow the amendment. *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994).

2. Here, justice requires that Plaintiff be allowed to amend the Complaint to add Defendant’s husband (“Defendant’s Husband”) as defendant because Plaintiff’s investigation and discovery have established a good faith basis for Plaintiff to believe that he is a direct infringer of Plaintiff’s copyrights.

3. At the time this case was originally filed, Plaintiff knew only that the infringer was using the internet subscriber’s IP address. Usually, the subscriber is the infringer. But, as is

the case here, sometimes the infringer is another person residing with the subscriber, who the subscriber has authorized to use the subscriber's internet.

4. Defendant's Husband resides at the address provided to Plaintiff by Defendant's ISP in response to Plaintiff's subpoena.

5. Plaintiff has a good faith basis to believe that Defendant's Husband is the individual who infringed Plaintiff's copyrighted works as alleged because expanded surveillance of the subject IP address has revealed evidence of third party infringements that are in line with Defendant's Husband's interests.

6. For example, Defendant's Husband's Facebook page lists Led Zeppelin, Van Halen, and Queen as his favorite music. He also lists "NCIS" and "Burn Notice" in his favorite TV shows and "Ted" in his favorite movies. Plaintiff's evidence of third party infringements includes the following relevant hits:

69.14.181.108	Queen - Albums (2011 Remastered) (MP3@320) (oan)
69.14.181.108	Van Halen - A Different Kind of Truth (2012) [FLAC]
69.14.181.108	Led Zeppelin Discography (1969-2012) [FLAC] [WwW.LoKoTorrents.CoM]
69.14.181.108	Led Zeppelin - Celebration Day
69.14.181.108	1970s Sounds Of The 70s (FLAC) (CD Rip)
69.14.181.108	Van Halen-A Different Kind Of Truth (2012), 320Kbit(mp3), DMT
69.14.181.108	Led Zeppelin - Quick Diet (2012) 3CD Mp3@320kbps Beolab1700
69.14.181.108	Led Zeppelin - Celebration Day [Deluxe Edition] [2CD+DVD] [FLAC] [2012]
69.14.181.108	Led Zeppelin - Celebration Day [2CD] {BriBerY}
69.14.181.108	Burn Notice S06E13 HDTV x264-ASAP[ettv]
69.14.181.108	NCIS.S10E03.HDTV.x264-LOL.mp4
69.14.181.108	NCIS.S10E22.HDTV.x264-LOL.mp4
69.14.181.108	NCIS.S10E12.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	Burn Notice S06E05 HDTV x264-ASAP[ettv]
69.14.181.108	Burn.Notice.S06E07.HDTV.x264-COMPULSION.[VTV].mp4

69.14.181.108	NCIS.Los.Angeles.S04E17.HDTV.x264-LOL.mp4
69.14.181.108	Burn.Notice.S06E16.HDTV.x264-ASAP.[VTV].mp4
69.14.181.108	NCIS.S10E20.HDTV.x264-LOL.mp4
69.14.181.108	NCIS.LosAngeles.S04E22.HDTV.Subtitulado.Esp.SC.avi
69.14.181.108	NCIS.S10E23.Xvid-AJAXEN.avi
69.14.181.108	Burn.Notice.S06E11E12.HDTV.x264-2HD.[VTV].mp4
69.14.181.108	NCIS.S10E11.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	NCIS.S10E21.HDTV.x264-LOL.mp4
69.14.181.108	Burn Notice S06E10 HDTV x264 + Subtitles [GlowGaze]
69.14.181.108	Burn.Notice.S06E06.HDTV.XviD-AFG
69.14.181.108	Burn.Notice.S06E09.HDTV.XviD-AFG
69.14.181.108	NCIS.S10E14.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	NCIS.S10E16.HDTV.x264-2HD.mp4
69.14.181.108	Burn.Notice.S06E17E18.HDTV.x264-ASAP.[VTV].mp4
69.14.181.108	NCIS S10E17 HDTV x264-LOL[ettv]
69.14.181.108	Led Zeppelin - Celebration Day 2012 [Bonus-DVD9-PAL-ISO] (oan)
69.14.181.108	Queen Wembley 86
69.14.181.108	Queen at Wembley(2011)-alE13
69.14.181.108	psig-ted.2012.dvdrip.xvid.ac3.avi
69.14.181.108	Led Zeppelin - Celebration Day 2012 BDRip 720p [MP4-AAC] (oan)
69.14.181.108	Led Zeppelin Celebration Day 2012 720p BluRay x264-SEMTEX [BrRip.eu]
69.14.181.108	Ted (2012) [1080p]
69.14.181.108	Ted (2012)

7. From Defendant's deposition, Plaintiff also learned that Defendant's Husband has (or had) a Samsung Galaxy S3 smartphone. Plaintiff's additional evidence includes:

69.14.181.108	All Galaxy S3 Ringtones - Honest
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8. Defendant's deposition also revealed that Defendant's husband had done significant remodeling to their home. Additional hits detected by Plaintiff's investigator include the following eBooks:

69.14.181.108	Black & Decker The Complete Guide to Bathrooms - Remodeling on a budget, Vanities & Cabinets, Plumbing &
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	Fixtures, Showers, Sinks & Tubs
69.14.181.108	Black & Decker The Complete Guide to Plumbing - All New Guide to Working with Gas Pipe
69.14.181.108	Black & Decker The Complete Photo Guide to Home Improvement - More Than 200 Value-Adding Remodeling Projects
69.14.181.108	Black.&.Decker.The.Complete.Guide.to.Contemporary.Sheds.OCR.BD.pdf
69.14.181.108	Black & Decker The Complete Guide DIY eBooks Collection
69.14.181.108	Black & Decker - The Complete Guide to Kitchens
69.14.181.108	Black & Decker The Complete Guide to Custom Shelves & Built-ins - Build Custom Add-ons to Create a One-of-a-kind Home
69.14.181.108	Handyman USA - The Ten Tips Issue, No.1 in DIY Home Improvement (March 2013)

9. As between the residents of Defendant's household – which includes Defendant, Defendant's Husband, and Defendant's daughter – Defendant's Husband is the only one with the means, *motive*, and opportunity to commit the infringement alleged. To wit: the large majority of subscriber's to Plaintiff's website are male. *See e.g. Malibu Media, LLC v. Jeffrey Roy*, 1:12-cv-00617-RJJ, CM/ECF 46, at p. 5 (W.D. Mich. Dec. 16, 2013) (denying motion for summary judgment noting that, "Malibu Media has introduced evidence that its subscribers are male 'by a large margin.' . . . This provides at least some support that Defendant, as opposed to his wife, was the offender.")

10. Based upon the foregoing information, Defendant's Husband, is the most likely person to have used BitTorrent in the house from where the infringement emanated. Consequently, Defendant's Husband is the most likely person to have infringed Plaintiff's copyrighted works through the use of BitTorrent and Plaintiff should be permitted to amend the Amended Complaint to name Defendant's Husband as a defendant.

11. Plaintiff will plead a claim for contributory infringement against Defendant for her inducing, causing, or materially contributing to the infringement of her husband. *See Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004).

12. Similar to Defendant's Husband, Plaintiff has substantial evidence of third party infringements that are in line with Defendant's interests. And, Defendant was the named internet subscriber who provided internet access to Defendant's Husband.

13. Defendant's Facebook page lists Darius Rucker, Eric Church, Rascal Flatts, Kenny Chesney, Blake Shelton, Jason Aldean, Lady Antebellum, Florida-Georiga Line, Jake Owen, Brad Paisley, and Dierks Bentley as her favorite music. Plaintiff's evidence of third party infringements includes:

69.14.181.108	01 Darius Rucker - Wagon Wheel.m4a
69.14.181.108	Darius Rucker - True Believers (2013) [FLAC]
69.14.181.108	Darius Rucker - Wagon Wheel [Music Video] 720p [Sbyky].mp4
69.14.181.108	Eric Church - Caught In The Act (Live) - (2013)
69.14.181.108	Rascal Flatts - Banjo [2012@MRD]
69.14.181.108	Rascal Flatts - _Why Wait_(2nafish).mpg
69.14.181.108	Kenny Chesney - Life On a Rock
69.14.181.108	Kenny Chesney - Pirate Flag.mp3
69.14.181.108	Kenny Chesney - Life On A Rock 2013 Country 320kbps CBR MP3 [VX]
69.14.181.108	Kenny Chesney -- Life On A Rock (2013.CnW)
69.14.181.108	Kenny Chesney - Pirate Flag.mp3
69.14.181.108	Blake Shelton - Based On A True Story 2013 Country 320kbps CBR MP3 [VX]
69.14.181.108	Blake Shelton- Cheers, It's Christmas- [2012]- NewMp3Club
69.14.181.108	Jason Aldean - 1994 (2013.CnW)
69.14.181.108	Jason Aldean - Night Train [2012]
69.14.181.108	Jason Aldean - Night Train (2012)
69.14.181.108	Lady Antebellum - Golden (2013) [FLAC]
69.14.181.108	Lady Antebellum-Golden (2013)
69.14.181.108	Lady Antebellum - Downtown.mp3

69.14.181.108	Lady Antebellum - Downtown [Music Video] 1080p [Sbyky].mp4
69.14.181.108	Florida Georgia Line - Get Your Shine On (2013.CnW)
69.14.181.108	Jake Owen - Barefoot Blue Jean Night 2011
69.14.181.108	Brad Paisley - 5th Gear Concert XviD
69.14.181.108	Dierks Bentley - Home (2012) [FLAC] vtwin88cube

14. Defendant's favorite TV shows include "The Bible Series," and "American Horror Story." She has also posted on Facebook about "Family Guy" more than once. The third party infringements include:

69.14.181.108	The.Bible
69.14.181.108	American.Horror.Story.S02E06.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	American.Horror.Story.S02E07.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	American.Horror.Story.S02E10.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	American.Horror.Story.S02E04.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	American.Horror.Story.S02E08.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	American.Horror.Story.S02E01.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	American.Horror.Story.S02E03.HDTV.x264-LOL.[VTV].mp4
69.14.181.108	Family.Guy.S11E19.HDTV.x264-LOL.mp4
69.14.181.108	Family Guy S11E21 HDTV x264-LOL[ettv]
69.14.181.108	Family.Guy.S11.Special-200.Episodes.Later.720p.HDTV.X264-DIMENSION.mkv
69.14.181.108	Family.Guy.S11E11.HDTV.x264-LOL.mp4
69.14.181.108	family.guy.1117.hdtv-lol.mp4
69.14.181.108	Family Guy volume 10
69.14.181.108	Family Guy S11E03 HDTV XviD-SaM[ettv]
69.14.181.108	Family.Guy.S11E05.HDTV.x264-LOL.mp4
69.14.181.108	Family Guy S11E01 HDTV x264-LOL[ettv]
69.14.181.108	Family.Guy.S11E04.HDTV.x264-LOL.mp4
69.14.181.108	Family.Guy.S11E09.HDTV.x264-LOL.mp4
69.14.181.108	Family.Guy.S11E22.HDTV.x264-LOL.mp4

15. If, as Defendant claims, Defendant did not directly infringe Plaintiff's works, Defendant knew or should have known that Defendant's Husband was downloading copyrighted works illegally and she knowingly allowed him to continue using their internet access to do so.

16. There is no question that the infringement of Plaintiff's works emanated from Defendant's household. Defendant and Defendant's Husband are playing a game of "hide the ball" with Plaintiff in an attempt to evade liability for the infringement.

17. Both Defendant and Defendant's Husband likely regularly used BitTorrent but, from the deposition of Defendant, it appears that Defendant's Husband was much more likely to have downloaded Plaintiff's content.

18. Granting the instant Motion will not prejudice any party and will instead allow Plaintiff to pursue the correct claims against Defendant and Defendant's Husband.

19. This Motion is made in good faith and not for any improper purpose such as undue delay.

20. Undersigned attempted to confer with defense counsel prior to filing the instant motion although no response was received.

WHEREFORE, Plaintiff, Malibu Media, LLC, respectfully requests entry of an order:

- (A) Granting Plaintiff's Motion for Leave to Amend the Amended Complaint; and
- (B) Granting Plaintiff such other and further relief as this Court deems just and proper.

Dated: January 7, 2014

Respectfully submitted,

NICOLETTI & ASSOCIATES, PLLC

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CERTIFICATE OF COMPLIANCE

Pursuant to MI R USDCTED LR 5.1(a) I hereby certify that the PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE AMENDED COMPLAINT has been prepared using one of the font and point selections approved by the Court in MI R USDCTED LR 5.1(a)(3). This document was prepared using Times New Roman (12 pt.).

Dated: January 7, 2013

By: /s/ Paul J. Nicoletti

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ Paul J. Nicoletti